HEDGEFORD SDN BHD v. TAN HEE YEAN & ANOR AND ANOTHER APPLICATION

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[JUDICIAL REVIEW NO. WA-25-179-10-2016
& WA-25-31-02-2017]
21 AUGUST 2019

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application for – Application to quash awards handed down by Tribunal of Homebuyer Claims ('Tribunal') allowing homebuyers' claims against developer – Late delivery of vacant possession by developer to homebuyers – Liquidated ascertained damages – Whether homebuyers' claims in breach of full and final settlement agreement reached between developer and homebuyers – Whether settlement sum binding on homebuyers – Homebuyers absent or represented by third party during proceedings before Tribunal – Whether procedural impropriety – Whether awards ought to be quashed – Housing Development (Control & Licensing) Act 1966, s. 16U*

LAND LAW: *Vacant possession – Late delivery – Claim for liquidated ascertained damages – Application to quash awards handed down by Tribunal of Homebuyer Claims ('Tribunal') allowing homebuyers' claims against developer – Whether homebuyers' claims in breach of full and final settlement agreement reached between developer and homebuyers – Whether settlement sum binding on homebuyers – Homebuyers absent or represented by third party during proceedings before Tribunal – Whether procedural impropriety – Whether awards ought to be quashed – Housing Development (Control & Licensing) Act 1966, s. 16U*

The applicant was the developer of a housing project ('the project') while the respondents were homebuyers who bought their respective units ('property') in the said project *vide* the respective sale and purchase agreements ('SPAs'). As there was a delay in the delivery of vacant possession of the properties, the developer approached the homebuyers with a 'letter of liquidated damages'. The said homebuyers were given a standard form to fill in by the applicant to claim the liquidated ascertained damages ('LAD') for the late delivery for vacant possession of the property and common facilities ('LAD compensation forms'). The LAD Compensation Forms were given to the homebuyers to be filled during the collection of the keys at the applicant's office. The homebuyers had signed the LAD compensation forms. The applicant claimed that by signing the LAD compensation forms, the homebuyers had agreed to the amount of LAD ('settlement sum'). The homebuyers, however, took the position that the LAD calculation by the developer in the LAD letter was inaccurate. Therefore, the homebuyers filed a claim against the developer in the Tribunal of Homebuyer Claims ('tribunal') as the developer had failed to deliver vacant possession within 36

months from the date of the payment of the deposits, and that vacant possession was only delivered on 16 November 2015. After hearing the parties, the tribunal handed down the awards in favour of the homebuyers. Aggrieved by the said award, the developer filed a judicial review application to challenge the said award. There were two applications before the court (i) in WA-25-179-10-2016 ('Suit 179'), the applicant sought an order of *certiorari* to quash the decision given by the tribunal allowing the claim by the first respondent in the sum of RM27,691.55; and (ii) in WA-25-31-02-2017 ('Suit 31'), the applicant sought an order of *certiorari* to quash the decision given by the tribunal which had allowed the claims filed by the first to fifth respondents. The issues that arose were (i) whether the tribunal had committed an error of law when the tribunal failed to consider that the homebuyers' claims for LAD were in breach of the full and final settlement reached between the developer and the said homebuyers, *vide* the LAD compensation form/settlement sum; (ii) whether there had been procedural impropriety as the homebuyers were absent or were represented by a third party during the proceedings before the tribunal; (iii) whether the tribunal had made an error in law when it allowed the homebuyers' claim for the LAD to be calculated based on the date of payment of the deposit, and not from the date of the SPA.

Held (allowing application in part):

(1) The LAD compensation form/settlement sum was the subject matter of a civil suit in the High Court WA-22NCVC-644-10-2016 involving the same parties, and the issue was whether the LAD compensation form/settlement sum was binding on the homebuyers. The court subsequently made a finding that the LAD compensation form/settlement sum was not binding on the homebuyers and that the respective homebuyers were not estopped from bringing their claims for compensation before the tribunal. Bearing in mind that one of the grounds of this application to quash the award was that the LAD compensation form/settlement sum acted as an estoppel in the filing of the claims for LAD before the tribunal, therefore the decision in the civil suit had effectively nullified the said ground as a basis for this application. As such, this ground for judicial review was no longer legally tenable. (paras 18-20)

(2a) The heading of s. 16U of the Housing Development (Control and Licensing) Act 1966 ('HDA') reads 'Right to appear at hearings.' Giving a plain and ordinary meaning to s. 16U, the right to be heard before the tribunal is expressly given to the parties to the claim, namely the homebuyer and the housing developer. Only the parties to the claim are entitled to attend and submit before the tribunal, with

the exceptions as provided by s. 16U(2) and (3). Any other party, such as the third party representing the first respondent/homebuyer in Suit 179 and the second and fifth respondents/homebuyers in Suit 31 were statutorily excluded from appearing on behalf of the homebuyer or to represent the homebuyer in the proceedings before the tribunal. The claimants should bear their own responsibility to attend the hearing before the tribunal by themselves and any non-party or third party could not be delegated to attend the same or to represent the claimants. (paras 32, 37 & 39)

(2b) In the present case, the homebuyer was represented by one Mr Sri in Suit 179 before the tribunal, as the notes of proceedings showed that Mr Sri was the homebuyer's spokesperson. The homebuyer's explanation that she had authorised Mr Sri because she was old was not the statutory exception provided by s. 16U(2) and (3). With regard to Suit 31, the second and the fifth respondents were absent during the proceedings, and were represented by third parties. Their excuse was that they were domiciled overseas. Again, this reason was not the statutory exception provided by s. 16U(2) and (3). When the tribunal had allowed the third parties to represent the respective homebuyers before the tribunal and allowed their claims for LAD against the developer, the tribunal had failed to apply the law and observe the requirements of s. 16U. This amounted to procedural impropriety as s. 16U only allows the parties to the claim to be present and present their cases. In the premise, the awards of the tribunal in respect of these homebuyers were hereby quashed. (paras 39-42)

(2c) Under s. 16AE of the HDA, the tribunal's power to adopt such procedure as it thinks fit and proper is subject to the HDA itself, that is, it is subject to s. 16U, which regulates the appearance and representation at proceedings before the tribunal. Therefore, where there is a specific provision that regulates the appearance and representation at proceedings before the tribunal under s. 16U, there cannot be any recourse to a general provision under s. 16AE. Pursuant to the principle of statutory interpretation of '*generalibus specialia derogant*', the specific provision on the rights to appear at hearings before the tribunal in s. 16U must take precedence over the general provision in s. 16AE. (para 45)

(3) The tribunal did not commit any error when it held that for the purposes of computation of the period of delay for late delivery, the commencement date shall be the date when the booking fee was paid, and not from the date of the SPA. In the premise, the developer's application to quash the awards in favour of the first, third and fourth

respondents/homebuyers were dismissed. However, the tribunal's decision in allowing third parties to represent the homebuyers at hearings before it was against s. 16U of the HDA and the tribunal had committed a procedural impropriety which warranted the award in Suit 179, and the awards in favour of the second and the fifth respondents in Suit 31 to be quashed. However, the application to quash the rest of the awards were dismissed. (paras 54 & 56-58)

Case(s) referred to:

ABT Construction Sdn Bhd & Anor v. Tribunal Tuntutan Pembeli Rumah & Ors [2013] 8 CLJ 1020 HC ***(refd)***

Chin Choy & Ors v. Collector of Stamp Duties [1978] 1 LNS 26 FC ***(refd)***

Faber Union Sdn Bhd v. Chew Nyat Shong & Anor [1995] 3 CLJ 797 SC ***(refd)***

Faber Union Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Perumahan Dan Kerajaan Tempatan & Ors [2011] 7 CLJ 37 HC ***(refd)***

GJH Avenue Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors [2017] 1 LNS 193 HC ***(refd)***

Hoo See Sen & Anor v. Public Bank Bhd & Anor [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125 SC ***(refd)***

Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener) [2009] 4 CLJ 347 FC ***(refd)***

Kerajaan Sarawak & Anor v. Abdul Wahab Abdullah [2007] 2 CLJ 339 CA ***(refd)***

Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***

Lembaman Development Sdn Bhd v. Ooi Lai Yin & Anor and Other Cases [2015] 6 CLJ 375 HC ***(refd)***

Lim Eh Fah & Ors v. Seri Maju Padu [2002] 4 CLJ 37 HC ***(refd)***

Malaysia Land Properties Sdn Bhd v. Chan Cecilia & Anor [2011] 1 LNS 55 HC ***(refd)***

Merck KGaA v. Leno Marketing (M) Sdn Bhd; Registrar of Trade Marks (Interested Party) [2018] 6 CLJ 167 FC ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***

Nippon Express (M) Sdn Bhd v. Che Kiang Realty Sdn Bhd & Another Appeal [2013] 7 CLJ 713 CA ***(refd)***

PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(refd)***

Telekom Malaysia Bhd v. Tribunal Tuntutan Pengguna & Anor [2007] 1 CLJ 300 HC ***(refd)***

Westcourt Corporation Sdn Bhd lwn.. Tribunal Tuntutan Pembeli Rumah [2004] 4 CLJ 203 FC ***(refd)***

Legislation referred to:

Housing Development (Control And Licensing) Act 1966, ss. 16U(2), (3), (4), 16AE

(Judicially Review No: WA-25-179-10-2016)
For the applicant - Justin Voon & Chiam Jia Yann; M/s Justin Voon Chooi & Wing
For the 1st respondent - Aarthi Jeyarajah; M/s Shearn Delamore & Co

(Judicially Review No: WA-25-31-02-2017)
For the applicant - M Puvanna; M/s Shearn Delamore & Co
For the 1st respondent - Justine Voon & Chiam Jia Yann; M/s Justin Voon Chooi & Wing

Reported by Suhainah Wahiduddin

JUDGMENT

Azizah Nawawi J:

Applications

[1] There are two applications before this court:

(i) In WA-25-179-10-2016 ("Suit 179"), the applicant is the developer, and is seeking for an order for *certiorari* to quash the decision dated 22 September 2016 given by the tribunal of homebuyer claims ("tribunal") allowing the claim by the first respondent in the sum of RM27,691.55.

(ii) In WA-25-31-02-2017 ("Suit 31"), the applicant developer is seeking for an order for *certiorari* to quash the decision dated 16 January 2017 given by the tribunal which had allowed the following claims filed by the first to the fifth respondents, which are as follows:

Claims	Respondent	Sum Awarded
TTPP/W/0714/16	Rizawati binti Kamaruddin	RM31,556.72
TTPP/W/0712/16	Raveena Gill a/p Sirgit Singh	RM33,235.69
TTPP/W/0715/16	Juliet Cynthia Jacobs	RM34,830.30
TTPP/W/0676/16	Renuka a/p Kunathevan	RM17,455.66
TTPP/W/0678/16	Renuka a/p Kunathevan	RM35,318.66
TTPP/W/0681/16	Kalyani a/p Veloo	RM35,485.61

[2] The grounds of the application are, *inter alia*, that the tribunal has erred in applying and construing the principles of law and that the tribunal had acted in excess of jurisdiction when the respondents were represented by a third party and/or did not attend the hearing before the tribunal.

[3] Having considered the applications and the submissions of the parties, this court had partly allowed the applications with no order as to costs.

The Salient Facts

[4] The applicant is the developer ("developer") of a housing project known as "HEDGEFORD 10 RESIDENCES" on Lot PT 28368, Mukim Setapak, Kuala Lumpur (the "project").

[5] The first respondent in Suit 179 and the first to the fifth respondents in Suit 31 ("homebuyers") have bought their respective units ("property") in the said project *vide* the respective sale and purchase agreements ("SPAs").

The SPA is in the standard form Schedule H to the Housing Development (Control and Licensing) Regulations 1989 ("HDA Regulations"). The details are as follows:

Date of SPA	Homebuyers	Purchase Price (RM)	Property
25.7.2012	Tan Hee Yean @ Tan Hee Hian	376,300.00	C-12-08
10.10. 2012	Rizawati binti Kamaruddin	344,650.00	C-12-05
7.9.2012	Raveena Gill a/p Sirgit Singh	370,300.00	C-09-01
7.9.2012	Juliet Cynthia Jacobs	340,650.00	C-08-03
7.9.2012	Renuka a/p Kunathevan	365,400.00	C-10-12
10.10.2012	Renuka a/p Kunathevan	365,400.00	C-10-12
7.9.2012	Kalyanni a/p Veloo	376,400.00	C-18-13

[6] Pursuant to cl. 25(1) of the SPA, vacant possession of the parcel shall be delivered by the applicant within 36 months from the date of the SPA.

[7] Pursuant to cl. 27(1) of the SPA, the common facilities shall be completed within 36 months from the date of the SPA.

[8] Vacant possession of the parcel and the common facilities were delivered on 16 November 2015 *vide* the notice of delivery of vacant possession issued to the homebuyer.

[9] As there was a delay in delivery of vacant possession, the developer approached the homebuyers (Tan Hee Yean @ Tan Hee Hian and Rizawati binti Kamaruddin) with a "letter of liquidated damages". The said homebuyers were given a standard form to fill in by the applicant to claim the liquidated ascertained damages ("LAD") for the late delivery for vacant possession of the property and common facilities ("LAD compensation forms").

[10] The LAD compensation forms were given to the homebuyers to be filled during the collection of the keys at the applicant's office. The homebuyers had signed the LAD compensation forms. The applicant claimed that by signing the LAD Compensation Forms, the homebuyers had agreed to the amount of LAD ("settlement sum").

The details of the LAD compensation form/settlement sum are as follows:

Date	Respondent	Settlement Sum (RM)	Property
22.12.2015	Tan Hee Yean @ Tan Hee Hian	11,649.84	C-12-08
6.1.2016	Ong Hung Hua	3,682.56	C-12-05

[11] The homebuyers however take the position that the LAD calculation by the developer in the LAD letter is inaccurate. Therefore, the homebuyers filed a claim against the developer in the tribunal as the developer had failed to deliver vacant possession within 36 months from the date of the payment of the deposits and that vacant possession was only delivered on 16 November 2015.

[12] After hearing the parties, the tribunal had on 29 September 2016, handed down the award in favour of the homebuyers.

[13] Being aggrieved by the said award, the developer had filed this judicial review application to challenge the award dated 16 December 2016.

Findings Of The Court

[14] With regards to the substantive application, the governing principles on judicial review relating to statutory tribunals were held by the court in *Telekom Malaysia Bhd v. Tribunal Pengguna & Anor* [2007] 1 CLJ 300, where Low Hop Bing J (later JCA) held as follows:

> [12] At this juncture, it is appropriate for me to set out the principles governing the grounds for sustaining a substantive notice of motion to challenge a decision-making process by way of *certiorari*, as follows:
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> (1) It is neither an appeal nor a review of the decision itself, but a review of the decision-making process of the tribunal to see if there are errors of law on the face of the record;
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> (2) It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed;
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> and an error may be disclosed if the decision-maker eg:
>
> (a) asks himself the wrong question;
>
> (b) takes into account irrelevant considerations;
>
> (c) omits to take into account certain relevant considerations (an *Anisminic* error);
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> (d) misconstrues the terms of the relevant statute; or
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> (e) misapplies or misstates a principle of general law.
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> (per Gopal Sri Ram JCA in *Syarikat Kenderaan Melayu Kelantan Berhad v. Transport Workers Union* [1995] 2 CLJ at p 765 f-g CA);

(3) In process or substance, an impugned decision is flawed on ground of:

(a) illegality, meaning that the decision must be based on law and the decision-maker must understand directly the law that regulates his decision-making power and must give effect to it, and whether he has or not is par excellence a justiciable question;

(b) irrationality meaning "*Wednesbury* unreasonableness", so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it, as enunciated in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223;

(c) procedural impropriety covering failure:

(i) to observe basic rules of natural justice;

(ii) to act with procedural fairness;

(iii) to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice; and

(4) possibly, proportionality.

(per Edgar Joseph Jr FCJ in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 at pp 172b-173b; referring to the judgment of Lord Diplock in Council of *Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374.)

[15] With regards to the housing tribunal, in *ABT Construction Sdn Bhd & Anor v. Tribunal Tuntutan Pembeli Rumah & Ors* [2013] 8 CLJ 1020, Justice Varghese George (later JCA) held as follows:

[37] The court in dealing with a judicial review application was not sitting in appeal against the impugned decision or award but only exercising the court's supervisory powers over subordinate tribunals. *To merit curial intervention, the applicant concerned had to establish that 'errors' in the nature of 'illegality', 'irrationality' or 'procedural impropriety' (and maybe 'proportionality) had been committed during the decision making process …*

[38] The judicial review court's intervention on the grounds of 'illegality' would be available if it was shown that the decision maker had misconstrued any provision of a statute or misapplied a principle of general law. A decision could be quashed on the basis of 'irrationality' if it was shown that there was no basis to support the finding of fact, or the conclusion reached was diametrically contrary to evidence on record or where the decision maker had asked the wrong questions or taken into consideration irrelevant matters and omitted relevant matters.

(emphasis added)

[16] Bearing in mind the abovementioned principles, I will now deal with the issues raised by the developer.

Settlement Agreement

[17] The first issue raised by the developer is that the tribunal had committed an error of law when the tribunal has failed to consider that the homebuyers' (Tan Hee Yean @ Tan Hee Hian and Rizawati binti Kamaruddin) claims for LAD were in breach of the full and final settlement reached between the developer and the said homebuyers, *vide* the LAD compensation form/settlement sum.

[18] It is not in dispute that the developer and the respective homebuyers have signed the LAD compensation form/settlement sum where the respective payments have been made to the homebuyers and accepted by the homebuyers. However, the said LAD compensation form/settlement sum was the subject matter of a civil suit in the Kuala Lumpur High Court WA-22NCVC-644-10-2016 involving the same parties, and the issue was whether the LAD compensation form/settlement sum are binding on the homebuyers.

[19] Subsequently, the court in Suit WA-22NCVC-644-10-2016 made a finding that the LAD compensation form/settlement sum is not binding on the Homebuyers and that the respective homebuyers are not estopped from bringing their claims for compensation before the tribunal.

[20] Bearing in mind that one of the grounds of this application to quash the award is that the LAD compensation form/settlement sum acts as an estoppel in the filing of the claims for LAD before the tribunal, therefore the decision in the Civil Suit WA-22NCVC-644-10-2016 has effectively nullified the said ground as a basis for this application. As such, I find that this ground for judicial review is no longer legally tenable.

Procedural Impropriety – Homebuyer Was Absent Or Represented By A Third Party

[21] The next issue raised by the developer is that there has been a procedural impropriety as the homebuyers were absent or were represented by a third party during the proceedings before the tribunal.

Suit 179

[22] With regards to Suit 179, it was not in dispute that the homebuyer was represented by one Mr. Sri Gananatha a/l Sivanathan ("Mr. Sri") during the proceedings before the tribunal. In fact, Mr. Sri had produced a letter of authorisation to act for and to submit on behalf of the homebuyer. Even though the homebuyer was present, the record shows that Mr. Sri had acted as the 'spokesperson' during the hearing on 22 September 2016.

A *Suit 31*

[23] In this suit, the second respondent did not attend the proceedings before the tribunal, but was represented by one Ms. Laavinia, *vide* a letter of authorisation during the hearing on 20 December 2016, 12 January 2017 and 16 January 2017, when the award was delivered.

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[24] The fifth respondent did not attend any of the proceedings on 16 December 2016, 12 January 2017 and 16 January 2017 but was represented by one Valerie.

[25] Therefore, the issue here is whether there had been a procedural C impropriety where the homebuyer was absent and/or was represented by a third party to attend and/or to submit during the hearing at the tribunal.

[26] It is common ground that s. 16U of the HDA 1966 governs the rights of the parties to appear before the tribunal. Section 16U reads:

D **16U. Right to appear at hearings.**

(1) At the hearing of a claim every party shall be entitled to attend and be heard.

(2) No party shall be represented by an advocate and solicitor at a hearing unless in the opinion of the Tribunal the matter in question E involves complex issues of law and one party will suffer severe financial hardship if he is not represented by an advocate and solicitor; but if one party is subsequently allowed to be represented by an advocate and solicitor then the other party shall also be so entitled.

F (3) Subject to subsection (2) but notwithstanding section 37 of the Legal Profession Act 1976 [Act 166]

(a) a corporation or an unincorporated body of persons may be represented by a full-time paid employee of the corporation or body;

G (b) a minor or any other person under a disability may be represented by his next friend or guardian *ad item*.

(4) Where a party is represented as permitted under subsection (3), the Tribunal may impose such conditions as it considers necessary to ensure that the other party to the proceedings is not substantially disadvantaged.

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[27] It is the submission of the developer that under the HDA 1966, only the homebuyer and the developer have a right of hearing before the tribunal, and the parties have to appear in person. Section 16U, however provides three exceptions to this, namely:

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(i) where in the tribunal's opinion the matter involves complex issues of law and the party will suffer severe financial hardship if he is not represented by an advocate and solicitor, the tribunal would allow both parties to be represented by advocates and solicitors; or

(ii) a full-time employee may represent a corporation or an unincorporated body of persons; or

(iii) a minor or a person with disability may be represented by his next friend or guardian *ad litem*.

[28] On the issue of statutory interpretation, in the case of *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636; [1997] 1 MLJ 94, the Federal Court has held that:

> The function of a Court when construing an Act of Parliament is to interpret the statute in order **to ascertain legislative intent primarily by reference to the words appearing** in the particular enactment. *Prima facie*, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:
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> > As a general rule a Court will adopt that construction of a statute which will give some effect to all of the words which it contains. Per Gibbs J in *Beckwith v. R*. [1976] 12 ALR 333, at p. 337.

[29] In the case of *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177 Augustine Paul FCJ said at p. 200:

> *Thus when the language used in a statute is clear effect must be given to it.* As Higgins J said in *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* [1920] 28 CLR 129 at pp 161-162:
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> > *The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole.* The question is, what does the language mean; and *when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning* even if we think the result to be inconvenient, impolite or improbable.
>
> *The primary duty of the court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention* (see *Nathu Prasad v. Singhai Kepurchand* [1976] Jab LJ 340). Thus the duty of the court, and its only duty, is to expound the language of a statute in accordance with the settled rules of construction and has nothing to do with the policy of any statute which it may be called upon to interpret (see *Vacher & Sons Ltd v. London Society of Compositors* [1913] AC 117; *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79; [1987] 1 MLJ 39). (emphasis added)

[30] In *Kerajaan Sarawak & Anor v. Abdul Wahab Abdullah* [2007] 2 CLJ 339 Zaleha Zahari JCA said as follows:

> The governing principle of interpretation is that, in construing a statute, the function of the court is to discover the true intention of the legislature. In that process the court is under a duty to adopt an approach that promotes the purpose or object underlying that particular statute. To ascertain the meaning of a clause in a statute, the court must look at the whole statute, at what precedes and what succeeds it, not merely at the clause itself. *It is a well-established principle that the purposive approach to the interpretation of legislation only applies where doubt arises from the terms or words employed by the legislature. Where the words used are precise and unambiguous, then the literal and strict construction rule should apply.* (emphasis added)

[31] The function of this court is therefore to ascertain the legislative intent by looking at the words in s. 16U of the HDA 1966 and to give it an ordinary or plain meaning. Only if there is any ambiguity will the purposive or other approaches be considered. In *Chin Choy & Ors v. Collector of Stamp Duties* [1978] 1 LNS 26; [1979] 1 MLJ 69, the Federal Court held as follows:

> It may be apposite at this stage to recall certain basic principles in the interpretation of statutes. *Applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be to construe the phrases and sentences according to the rules of the grammar.* (emphasis added)

[32] Therefore, giving a plain and ordinary meaning to s. 16U of the HDA 1966, the right to be heard before the tribunal is expressly given to the parties to the claim, namely the homebuyer and the housing developer. It is only in cases involving complex issues of law and where the party will "suffer severe financial hardship", where a party is allowed to be represented by an advocate and solicitor. However, where one party is allowed to be represented by an advocate and solicitor, s. 16U(2) entitles the other party to also be represented by a solicitor. Subject to the exception in sub-ss. 16U (2) and (3) it allows parties who are corporations or unincorporated body of persons to be represented by a full-time employee and a minor or a person under a disability to be represented by his next friend or guardian *ad litem*.

[33] As such, where sub-ss. 16U (2) and (3) have expressly named specific circumstances where the claimant/homebuyer may be represented by a third party, this means that in all other situations which have not been expressly set out in s. 16U, any representation by a third party are therefore excluded.

[34] The Latin maxim of construction of "*Expressio unius est exclusion alteris*", which means the express mention of one person or thing implies the exclusion of other persons or things is applicable in the construction of s. 16U. In *Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener)* [2009] 4 CLJ 347, the Federal Court held at pp. 360-361:

> [26] The differences in the provisions of the above Constitutions clearly show that the maxim *expressio unius est exclusio alterius (which means that the express mention of one thing implies the exclusion of another thing not so mentioned) applies in the construction of those Constitutions* because as demonstrated earlier, some States such as Johore, Negeri Sembilan, Selangor and Terengganu have intentionally omitted to mention the establishment by the Election Commission of a casual vacancy in their Constitutions unlike those of Kelantan, Malacca, Pahang, Penang, Perlis, Sarawak, Kedah, Perak Constitutions and the Federal Constitution, which intentionally mentioned that a casual vacancy shall be filled within sixty days from the date on which it is established by the Election Commission that there is a casual vacancy. (See *S. Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors* [1982] CLJ 65; [1982] CLJ (Rep) 314). (emphasis added)

[35] Added to that, sub-s. 16U(4) expressly uses the words "where a party is represented as permitted under sub-s. (3) ...", simply reinforce the position that a claimant cannot be represented by any other third party unless the circumstances fall under any of the exceptions as provided under sub-s. 16U(3) of the HDA 1966.

[36] Further, the heading in a statutory provision may be considered in the interpretation of s. 16U. In *Merck KGaA v. Leno Marketing (M) Sdn Bhd; Registrar of Trade Marks (Interested Party)* [2018] 6 CLJ 167, the Federal Court held at p. 185:

> [45] The function of headings and their proper role in statutory interpretation is as explained in *FAR Bennion, Bennion on Statutory Interpretation*, 5th edn. (LexisNexis: 2008) at p. 745:
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> > **A heading within an Act**, whether contained in the body of the Act or a Schedule, is part of the Act. **It may be considered in construing any provision of the Act**, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore necessarily inaccurate, guide to the material to which it is attached.

[37] The heading of s. 16U reads "Right to appear at hearings", simply means that the rights to appear are specified in s. 16U. Therefore, only the parties to the claim are entitled to attend and submit before the tribunal, with the exceptions as provided by sub-ss. 16U(2) and (3). Any other party, such as the third party representing the first respondent/homebuyer in Suit 179 and the second and fifth respondents/homebuyers in Suit 31 are statutorily excluded from appearing on behalf of the homebuyer or to represent the homebuyer in the proceedings before the tribunal.

[38] In any event, the tribunal is supposed to be an easy access and simple avenue for the public to resolve their claims against the developer. As observed by the Federal Court in *Westcourt Corporation Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah* [2004] 4 CLJ 203; [2004] 6 AMR 381; [2006] 1 MLJ 339, the intention of Parliament in legislating for the tribunal in Part VI of the HDA is to provide a simple forum for homebuyers to pursue their claim against housing developers.

[39] Therefore, I am of the considered opinion that the claimants should bear their own responsibility to attend the hearing before the tribunal by themselves and any non-party or third party cannot be delegated to attend the same or to represent the claimants. In the present case, the homebuyer was represented by Mr. Sri in Suit 179 before the tribunal, as the note of proceedings shows that Mr. Sri was the homebuyer's 'spokesperson'. The homebuyer's explanation that she had authorised Mr. Sri because she was old is not the statutory exceptions provided by sub-ss. 16U(2) and (3).

[40] With regard to Suit 31, the second and the fifth respondents were absent during the proceedings, and were represented by third parties. Their excuse is that they were domiciled overseas. Again, this reason is not the statutory exceptions provided by sub-ss. 16U(2) and (3).

[41] Therefore, I find that when the tribunal had allowed the third parties to represent the respective homebuyers before the tribunal and allowed their claims for LAD against the developer, the tribunal had failed to apply the law and observed the requirements of s. 16U. This amounts to procedural impropriety as s. 16U only allows the parties to the claim to be present and presented their cases. In *Malaysia Land Properties Sdn Bhd v. Chan Cecilia & Anor* [2011] 1 LNS 55, Justice Aziah Ali held that:

> Thus although the Act is a social piece of legislation, *the Tribunal is not at liberty to ignore the express provisions of the Act. Where the words of the Act are clear and unambiguous, the Tribunal is obliged to apply the law and to observe the limits on its jurisdiction as specified under the Act.* I find from the Award that the Tribunal has ignored the express provisions of the Act. The Tribunal has failed to apply the clear and unambiguous words of the Act to the undisputed facts of this case. I find that the Tribunal has failed to consider relevant matters and has considered irrelevant matters. The Tribunal has asked the wrong questions. I agree with counsel for the Applicant that the Tribunal has misdirected itself on the law. (emphasis added)

[42] In the premise, the awards of the tribunal in respect of these homebuyers are hereby quashed.

[43] However, learned counsel for the homebuyers and the legal advisor to the tribunal take the position that the tribunal can make its own procedure to allow a homebuyer to be represented by a third party who is not an advocate and solicitor under s. 16AE of the HDA 1966, which states as follows:

> **Subject to this Act** and to any regulations, the Tribunal shall adopt such procedure as it thinks fit and proper. (emphasis added)

[44] Based on the said provision, the parties contended that the tribunal was entirely entitled to exercise its discretion in adopting procedures that it thinks fit and proper in the circumstances. Added to that, there is nothing in the HDA 1966 and the HDA Regulations that prohibits another layperson, duly authorised by the respective homebuyers to appear and/or make oral submissions during the hearing before the tribunal.

[45] However, under s. 16AE, the tribunal's power to adopt such procedure as it thinks fit and proper is subject to the HDA 1966 itself, that is, it is subject to s. 16U, which regulates the appearance and representation at proceedings before the tribunal. Therefore, where there is a specific provision that regulates the appearance and representation at proceedings before the tribunal under s. 16U, there cannot be any recourse to a general provision under s. 16AE. Pursuant to the principle of statutory interpretation of "*generalibus specialia derogant*", the specific provision on the rights to appear at hearings before the tribunal in s. 16U must take precedence over the general provision in s. 16AE. In *Public Prosecutor v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285; [1982] 2 MLJ 119 FC, Raja Azlan Shah CJ (Malaya) (as HRH then was) said this:

> ... *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law.

Calculations Of The LAD

[46] The developer takes the position that the tribunal has made an error in law when it allowed the homebuyers' claim for the LAD to be calculated based on the date of payment of the deposit, and not from the date of the SPA.

[47] Learned counsel for the homebuyer has referred to several cases where the courts have held that for the purposes of calculating the period of delay, time starts to run from the date of payment of the booking fee and not from the signing of the SPA. As early as 1988, in *Hoo See Sen & Anor v. Public Bank Bhd & Anor* [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125; [1988] 2 MLJ 170, the Supreme Court had decided that the relevant date for ascertaining when time started to run to be when the booking fee was paid. The Supreme Court held that:

A For the purpose of ascertaining the date of delivery of vacant possession, the relevant date when time started to run was the date on which the purchaser paid the booking fee, and not the date of signing of the sale and purchase agreement.

[48] The above principle was reaffirmed by another Supreme Court B decision in *Faber Union Sdn Bhd v. Chew Nyat Shong & Anor* [1995] 3 CLJ 797. The issue for determination by Supreme Court is whether, in ascertaining the date of delivery of vacant possession of a building to be constructed, time started to run from the date payment of the booking fee was made or from the date of the signing of the sale and purchase agreement. The C relevant clause in the agreement, cl. 6.06 of the sale and purchase agreement reads:

> the premises shall be completed by the vendor and vacant possession delivered to the purchaser within thirty-six (36) calendar months from the date of this agreement. If the vendor fails to deliver vacant possession of the premises on time the vendor shall pay to the purchaser liquidated D damages to be calculated from day to day at the rate of eight per cent (8%) per annum of the purchase price.

The deposit was paid on 17 February 1984 and the agreement was signed on 27 June 1984. The Supreme Court then held that for the purpose of ascertaining the date of delivery of vacant possession, the relevant date when E time starts to run is the date on which the purchaser paid the booking fee and not the date of the signing of the sale and purchase agreement.

[49] The decision of the Supreme Court was followed in *Lim Eh Fah & Ors v. Seri Maju Padu* [2002] 4 CLJ 37. In that case, the purchaser paid the deposit F on 17 July 1992. The sale and purchase agreement was executed on 10 October 1992. Suriyadi Halim Omar J (as His Lordship then was) held that the respondent assumed the responsibility to fulfil its part of the bargain at the date the deposit was paid, ie, 17 July 1992, in effect being the date when the contract was struck, and not the date the deed of assignment was signed. His Lordship held as follows: G

> As regards the date to take into consideration for purposes of calculating the damages on the late delivery of vacant possession, I **concluded it to be 17 July 1992, ie, the date when the deposit was paid, and not the date of the deed of assignment.** To support my findings, I seek solace from the case of *Faber Union Sdn. Bhd v. Chew Nyat Shong & Anor* [1995] 3 CLJ 797, H which factually was on all fours with the current case. (emphasis added)

[50] In *Faber Union Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Perumahan Dan Kerajaan Tempatan & Ors* [2011] 7 CLJ 37, Justice Aziah Ali (as Her Ladyship then was) applied the *ratio* in *Faber Union Sdn Bhd v. Chew Nyat Shong & Anor* and held as follows: I

> [13] The applicant contends that the Tribunal erred in amending the commencement date of the SPA to the date of payment of the deposit. The Tribunal relied on the case of *Faber Union Sdn Bhd v. Chew Nyat Shong & Anor* [1995] 3 CLJ 797 wherein the issue for determination by Supreme

> Court is whether, in ascertaining the date of delivery of vacant possession of a building to be constructed, time started to run from the date payment of the booking fee was made or from the date of the signing of the sale and purchase agreement. In that case the deposit was paid on 17 February 1984 and the agreement was signed on 27 June 1984. The Supreme Court held that for the purpose of ascertaining the date of delivery of vacant possession the relevant date when time starts to run is the date on which the purchaser paid the booking fee and not the date of the signing of the sale and purchase agreement ...
>
> *Thus I find that the Tribunal has not erred in deciding that the relevant date for the purpose of calculating the amount of damages payable by the applicant is the date the respondents paid the deposits.* (emphasis added)

[51] The Court of Appeal in *Nippon Express (M) Sdn Bhd v. Che Kiang Realty Sdn Bhd & Another Appeal* [2013] 7 CLJ 713 had also applied the principle in *Faber Union Sdn Bhd v. Chew Nyat Shong* and held that time should run from the booking fee was paid and not from the date when the sale and purchase agreement was sign. The court held as follows:

> [40] Our view on the calculation of the 30-month period is premised on the then Supreme Court judgment in *Faber Union Sdn Bhd v. Chew Nyat Shong & Anor* [1995] 3 CLJ 797; [1995] 2 MLJ 597 where the facts are these. The date of agreement was 27 June 1984 while the deposit was paid on 17 February 1984. The agreement provided for a 36-month delivery period of vacant possession from the date of the agreement and the issue to be determined was when the 36-month period starts to run. The Supreme Court relied on an earlier case of *Hoo See Sen & Anor v. Public Bank Bhd & Anor* [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125; [1988] 2 MLJ 170 where the factual matrix was the same. *Despite what is stated in the agreement, the Supreme Court held that for the purpose of ascertaining the date of delivery of vacant possession, the relevant date when time starts to run is the date on which the purchaser paid the booking fee and not the date of the sale and purchase agreement* ... (emphasis added)

[52] In *Lembaman Development Sdn Bhd v. Ooi Lai Yin & Anor and Other Cases* [2015] 6 CLJ 375, in dealing with the same cl. 26(1), the High Court held as follows:

> [8] The clear issue that lends itself for determination here is which date is to be taken as the date for computation of delay in delivery of vacant possession for the purposes of calculating the liquidated and ascertained damages (LAD). The authority relied upon by the tribunal in coming to its decision was the case of *Lim Eh Fah & Ors v. Seri Maju Padu* [2002] 4 CLJ 37 where on the facts a sum equivalent to 10% deposit was paid upon booking. The short issue was whether to adopt the booking dates or the sale agreement date of deed of assignment as contended by the developer. The court held that the booking date was to be adopted as that was the date when the contract was struck. In so holding the court reasoned as follows:
>
> > One must bear in mind that the date of 17 July 1992 ie, the deposit payment date, was the date when the contract was struck, and the

A very date the respondent assumed responsibility to fulfil its part of the bargain. If the date of the signing of the S&P agreement were to be taken as the relevant date, when time started to run for the delivery of the vacant possession, *the respondent could willy-nilly pick any dates it favoured to execute the S&P agreement, which would certainly prejudice the interest of the purchaser.* (emphasis added)

B [9] ...

[10] *The finding of this court therefore, that based on the aforesaid authority, the relevant date is the date when the booking fee was paid.* The *Lim Eh Fah* case clearly stipulated that where the position otherwise, developers could arbitrarily fix any date to have the SPA executed to the prejudice of the C purchasers. If this were to be the case, then developers would obviously choose a date later in time with the intention of potentially having to bear less damages for late delivery of vacant possession. Therefore, once the booking fee is paid, a contract comes into existence and parties assume obligations at that juncture, a breach of which would result in certain D consequences befalling the guilty party. The tribunal therefore had not erred when it decided on good authority and in the absence of any authorities to the contrary, to ascertain the date for calculation of damages for vacant possession with reference to the booking date.

[53] In a recent case involving the tribunal, the High Court in *GJH Avenue Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan* E *Bandar, Perumahan Dan Kerajaan Tempatan & Ors* [2017] 1 LNS 193, the High Court has to deal with a similar clause on the same issue of time for delivery of vacant possession:

... According to clause 22(1) vacant possession is to be delivered "**within twenty-four (24) calendar months from the date of this Agreement**". The F central question in this dispute is: What is the date of the agreement? Is it the date on which the booking fee was paid, as contended by the 2nd and 3rd Respondents, or is it the date appearing on the SPA, as is contended by the Applicant? The 1st Respondent found that the date of agreement is the date on which the booking fee or deposit was made. G Thus, the 1st Respondent calculated the 24 months for the SPA's completion from 10.11.2011, which means that vacant possession must be delivered on or before 10.11.2013.

...

[14] *So the law is well settled by high authority that for the purposes of determining* H *the date of delivery of vacant possession in an agreement such as the SPA, for reasons well explained in the above cases, the date of agreement is the date when the deposit or booking fee is paid and not the date that appears on the SPA. And by the doctrine of stare decisis, these decisions of the superior courts are binding on the 1st Respondent as a lesser tribunal, as well as this court.* This doctrine was reiterated by the Federal Court in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ I 577; [2012] MLJU 60 where the court held:

> The doctrine of precedent, a fundamental principle of English Law, is a form of reasoning and decision-making formed by case law. Precedents not only have persuasive authority but also must be followed when similar circumstances arise. Any principle announced by a higher court must be followed in later cases. In short the courts are bound within prescribed limits by prior decisions of superior courts. Judges are also obliged to obey the set-up precedents established by prior decisions. This legal principle is called *stare decisis*. Adherence to precedent helps to maintain a system of stable laws. Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of *stare decisis*, ie, to stand by the decided. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides consistency and predictability in the law.
>
> (emphasis added)

[54] Applying the principles in the above-mentioned case, I am of the considered opinion that the tribunal did not commit any error when it held that for the purposes of computation of the period of delay for late delivery, the commencement date shall be the date when the booking fee was paid, and not from the date of the SPA.

[55] Even though the earlier cases are not cases against the tribunal, the latter cases have applied the same principles with regards to awards of the tribunal.

[56] In the premise, the developer's application to quash the awards in favour of the first, third and fourth respondents/homebuyers are dismissed with no order as to costs.

Conclusion

[57] Premised on the reasons enumerated above, I am of the considered opinion that the tribunal's decision in allowing third parties to represent the homebuyers at hearings before it is against s. 16U of the HDA 1966. The tribunal had committed a procedural impropriety which warrants the award in Suit 179, and the awards in favour of the second and the fifth respondents in Suit 31 to be quashed.

[58] However, the application to quash the rest of the awards are dismissed with costs.